No. 18,246

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF CALIFORNIA, APPELLEE

Appeal from the United States District Court for the Southern District of California, Central Division

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The opinion of the district court (R. 21-37) is reported at 208 F.Supp. 861.

JURISDICTION

The United States filed this suit on April 10, 1962, for damages and costs of suppression of a fire allegedly resulting from negligence of employees of the State of California, invoking the jurisdiction of the district court under 28 U.S.C. sec. 1345 (R. 2-6). On April

30, 1962, the district court on its own motion dismissed the suit for lack of jurisdiction (R. 16-20). The United States filed notice of appeal on June 28, 1962 (R. 38), and invokes the jurisdiction of this Court under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the district court has jurisdiction over an action for damages and fire suppression costs brought by the United States against the State of California.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent portions of Article III of the Constitution of the United States read as follows:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Cit-

izens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * *

28 U.S.C. sec. 1251, entitled "Original Jurisdiction" and part of the Chapter on the Supreme Court, reads as follows:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. sec. 1345, entitled "United States as plaintiff," reads as follows:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

STATEMENT

On April 10, 1962, the United States filed a complaint alleging that negligence of employees of the State of California had caused a fire burning over some 24,000 acres in the Angeles National Forest and resulting in a loss to the United States of $479,-194.43 (R. 2-6). According to the complaint, the State Division of Highways, using prison inmate laborers, was building a highway within the forest. One of the prisoners, a member of a blasting crew, lit a fire within a warming stove at the top of a high pitched slope in a wooded and brush-covered area while a strong wind was blowing. An hour and a half later, the crew foreman took his crew from the construction site because of the increasing velocity of the wind, but, although he knew there was a fire in the stove, he failed to instruct anyone to put it out. Shortly thereafter, the wind blew the stove over, and the fire escaped and spread into the brush and forest. The damages claimed included $455,194.43 for fire suppression costs and $24,000 for damages to the forest resources. In a second count, the United States charged that the Division of Highways had

undertaken to extinguish the fire but had negligently and carelessly failed to do so. The complaint also alleged that the United States had presented a verified claim for its loss to the State Board of Control for the State of California.

On April 17, 1962, the district court issued a *sua sponte* order to show cause why the action should not be dismissed for lack of jurisdiction (R. 7). The complaint had alleged jurisdiction under 28 U.S.C. sec. 1345. After a hearing on April 30, 1962 (R. 15), the district court dismissed the suit for lack of jurisdiction (R. 16-20) and this appeal followed (R. 38).

Although the order of dismissal stated that the State of California is immune to negligence suits where the particular public activity involved is governmental in character (R. 16-17, Par. 2), and that the building of a highway is governmental in character (R. 17, Par. 3), the dismissal of the suit seemed to rest on the ground that Congress has not vested the district courts with jurisdiction over States as defendants in cases not involving the adjudication of property rights (R. 19-20, Pars. 8, 9). The district court later filed an opinion (R. 21-37) spelling out in more detail why 28 U.S.C. sec. 1345 should not be construed as granting the district courts jurisdiction over every kind of suit the United States might wish to bring against a State (see especially R. 32-35).

SPECIFICATION OF ERROR

The district court erred in dismissing this suit by the United States against the State of California for lack of jurisdiction.

SUMMARY OF ARGUMENT

Whether a federal court has jurisdiction in a given case depends on whether the federal judicial power extends to the case and whether Congress has given the particular court jurisdiction to exercise that power in the case. The three points of this brief will demonstrate (1) that the judicial power of the United States embraces suits by the United States against a State, (2) that Congress has given the district courts jurisdiction over such cases, and (3) that a State's immunity to private suit under its own law is not a barrier to such a suit.

I

Article III of the Constitution extends the judicial power of the United States to "Controversies to which the United States shall be a Party," and there exists no exception of cases where a State is defendant. The Supreme Court has frequently entertained suits by the United States against a State, even bypassing the presence of a federal question as a jurisdictional basis to hold that the judicial power extends to such suits simply because the United States is a party. The great variety of causes of action in these cases clearly demonstrates that the nature of the cause of action in a given case is immaterial when the United States is a party.

II

Although Article III of the Constitution gives the Supreme Court original jurisdiction over suits involving States, it does not give that Court exclusive jurisdiction over such suits. Congress, in 28 U.S.C. sec. 1251(b), has stated that this jurisdiction is original but not exclusive, and in 28 U.S.C. sec. 1345 it gives the district courts general jurisdiction over suits where the United States is plaintiff, "except as otherwise provided by Act of Congress." Since it is no longer "otherwise provided" that the Supreme Court has exclusive jurisdiction over suits by the United States against States, Section 1345 gives the district courts jurisdiction over such suits concurrent with that of the Supreme Court, and this Court has so held. Furthermore, it is quite clear from Supreme Court holdings at a time when it did have exclusive jurisdiction over such suits that it is not necessary for Congress to specify in every jurisdictional statute creating concurrent jurisdiction that States may be made defendants under it.

III

The Constitution establishes the judicial power of the United States, and the Constitution and the Judicial Code give various federal courts jurisdiction to exercise it. If federal jurisdiction exists in a given case, it cannot be modified by state law. Thus any immunity to suit California may have under its own law is irrelevant to the existence or non-existence of federal jurisdiction here. Any consent which it was necessary for California to give to suits by the United

States it did give when it accepted the constitutional scheme by joining the Union.

ARGUMENT

Jurisdiction of a particular federal court over a given case rests first on the existence of federal judicial power as granted by Article III of the Constitution, and second on the distribution of that power by Article III and by statute.[1] The court below erred by confusing the existence of judicial power with its distribution, by creating exceptions to the judicial power and its own jurisdiction for which there is no constitutional or statutory basis, and by introducing the wholly irrelevant matter of a State's immunity to suit by its citizens. We will show in Point I that Article III of the Constitution extends the federal judicial power to suits by the United States against a State without qualification as to subject matter. We will show in Point II that the Constitution gives the Supreme Court original but not exclusive jurisdiction over suits involving States, and that Congress has given the district courts concurrent jurisdiction over suits between the United States and a State, such as the case at bar. Finally, in

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[1] "Judicial power" and "jurisdiction" are not necessarily synonymous terms, though they are often used interchangeably. For example, Article III, Section 2, of the Constitution extends the judicial power of the United States to cases "between Citizens of different States," but Congress has given the district courts jurisdiction over such cases only where the amount in controversy exceeds $10,000. 28 U.S.C. sec. 1332.

Point III, we will show that questions of California's immunity to suit under state law have no bearing whatsoever on the existence or non-existence of federal jurisdiction.

I

The Judicial Power of the United States Extends To Suits By the United States Against a State

The federal judicial power embraces the present case simply by virtue of the presence of the United States as a party. Article III of the Constitution, the source of the judicial power of the federal courts, extends that power to nine different categories of cases and controversies, the fourth of which is "Controversies to which the United States shall be a Party." As we shall now demonstrate, no exception to the plain meaning of this clause exists because the other party to the suit is a State, irrespective of the nature of the cause.

Apparently the first suit brought by the United States against a State as defendant was *United States* v. *North Carolina*, 136 U.S. 211 (1890), a common law action of debt. Although no one argued the jurisdictional question in the *North Carolina* case, the Supreme Court was aware of the problem and assumed that it had jurisdiction, as the Court itself made clear two terms later in *United States* v. *Texas*, 143 U.S. 621 (1892). There, answering its own question as to whether the framers of the Constitution had failed "to provide for the judicial determination of controversies arising between the United

States and one or more of the States of the Union," the Court said (143 U.S. at 642):

> This question is in effect answered by *United States* v. *North Carolina*, 136 U.S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. *But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.* [Emphasis added.]

Because Texas had argued the jurisdictional question and North Carolina had not, the Court considered it proper to deal with the question on its merits in the *Texas* case instead of simply relying on the *North Carolina* case as resolving it. After setting out Section 2, Article III, the Court showed how the United States could sue Texas under its provisions (143 U.S. at 643):

> It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws

> and treaties of the United States, and, also, one *in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends.* [Emphasis added.]

The classes of cases referred to are those described in *Cohens* v. *Virginia*, 6 Wheat. 264, 376-377 (1821):

> The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. *In the second class, the jurisdiction depends entirely on the character of the parties.* In this are comprehended "controversies between two or more states, between a state and citizens of another state," and "between a state and foreign states, citizens or subjects." *If these be the parties, it is entirely unimportant, what may be the subject of controversy.* Be it what it may, these parties have a constitutional right to come into the courts of the Union. [Emphasis added.]

The distinction between classes of cases is important here because this case falls into the class in which

the existence of judicial power rests upon the character of the parties.[2] In that respect, even if the present case could be partially distinguished from *United States* v. *Texas*, where there was a question "arising under the Constitution, laws and treaties of the United States," it cannot be distinguished from *United States* v. *North Carolina*, where there was no such question, i.e., no "federal question." Thus it is clear from *Cohens* v. *Virginia* and *United States* v. *North Carolina*, as approved by *United States* v. *Texas*, that the constitutional extension of the judiciary power of the United States to "Controversies to which the United States shall be a Party" embraces suits by the United States against a State, irrespective of the nature of the case.[3]

That the presence of a question arising under the Constitution, laws, or treaties of the United States

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[2] Because the presence of the United States clearly establishes jurisdiction, we need not discuss here the question whether the fact by itself that the subject matter of the action is the recovery of damage to federal property—the management of which Article IV of the Constitution vests in Congress—brings the case within the first category mentioned in *Cohens*.

[3] Since the nature of the case has no effect on the existence of judicial power resting on the presence of the United States, it makes no difference that the United States' allegations of negligence state an action sounding in tort. But it is interesting to note that the California Health & Safety Code, Sec. 13009, provides an action in debt for fire suppression costs. Cf. *People of California* v. *United States*, 307 F.2d 941 (C.A. 9, 1962). Thus, the United States' cause of action for such costs in the present case is indistinguishable from that in *United States* v. *North Carolina*, which was an action in debt.

is not essential to the existence of federal judicial power was even more firmly established in *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902), a suit to enjoin the Secretary of the Interior from selling Indian lands within the State of Minnesota. There the Court on its own motion raised the question of whether the case was one to which the judicial power of the United States extends. Passing other possible bases of jurisdiction, including the presence of a federal question, as unnecessary to the disposition of the case, the Court held that it had jurisdiction because the case was one "to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends." 185 U.S. at 384. The Court then demonstrated that the United States, not the Secretary of the Interior, was the real party in interest. The point to be noted was that the Court held that the controversy was within the federal judicial power solely because the United States was a party and not because of the character of the case.

The Supreme Court has never concerned itself with the character of the case or controversy—once it has determined that there is a case or controversy—in holding that it has jurisdiction over a suit between the United States and a State. Consequently, the district court in this case had no basis for believing that the United States can bring some kinds of suits but not others. It would unduly prolong this brief to discuss all the cases in which the Supreme Court has entertained a suit by the United States, but it

is instructive to list some of the causes of action in these cases:

> Suit for an accounting and to enforce a trust. *United States* v. *Michigan*, 190 U.S. 379 (1903).
>
> Suit to settle boundary dispute and to quiet title to a river bed. *Oklahoma* v. *Texas*, 258 U.S. 574 (1922) (United States intervened).
>
> Suit to cancel patents issued under a swampland grant. *United States* v. *Minnesota*, 270 U.S. 181 (1926).
>
> Suit to quiet title to river beds within State. *United States* v. *Utah*, 283 U.S. 64 (1931).
>
> Suit to quiet title. *United States* v. *Oregon*, 295 U.S. 1 (1935).
>
> Suit to enjoin interference with construction of a federal dam. *United States* v. *Arizona*, 295 U.S. 174 (1935).
>
> Suit to establish paramount federal authority with respect to building dams on certain rivers and to enjoin construction of a dam under state authority. *United States* v. *West Virginia*, 295 U.S. 463 (1935) (dismissed for lack of a controversy between the United States and the State.)
>
> Suit (brought in a district court) by the United States to recover a statutory penalty for violation of the federal Safety Appliance Act. *United States* v. *California*, 297 U.S. 175 (1936).
>
> Suit to have removed, as clouds on title, state tax liens on land purchased by Government. *United States* v. *Alabama*, 313 U.S. 274 (1941).
>
> Suit to establish federal title to land within State and to recover for oil which had been removed

and sold under a state lease. *United States* v. *Wyoming*, 331 U.S. 440 (1947).

Suit to declare rights in off-shore area and to enjoin trespass. *United States* v. *California*, 332 U.S. 19 (1947).

Suits to declare rights in off-shore area, to enjoin trespass, and for accounting. *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950).

The variety of causes of action and the decisions in the above cases demonstrate that the character of the suit has never been a material consideration in determining whether a particular suit was within the federal judicial power. There is no limitation to cases adjudicating property interests between sovereigns, as suggested in paragraph 8 of the district court's order (R. 19, cf. R. 33), nor to cases where the United States asks for protection and enforcement of its powers under the supremacy clause, U.S. Const. Art. VI, sec. 2, against encroachment by a State, as suggested in the district court's opinion (R. 29). Even if there were such limitations, it is difficult to see why suit for damage to a national forest is not a suit to protect a property interest.

Reference to the nature of a question in a case is necessary only when jurisdiction depends upon the presence of a federal question. Here, where jurisdiction rests on the presence of the United States, the nature of the question is immaterial. The case is plainly within Article III's extension of the judicial power to "Controversies to which the United States shall be a Party."

II

The Federal District Courts Have Concurrent Jurisdiction With the Supreme Court Over Suits By the United States Against a State

Once it is established that a particular case is within the judicial power of the United States, it next becomes necessary to determine what federal court has jurisdiction to exercise this power. Clause 2, Section 2, Article III, makes a partial distribution of the power and leaves the remainder of the problem to Congress:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and *those in which a State shall be Party, the supreme Court shall have original Jurisdiction.* In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. [Emphasis added].

The appellate jurisdiction is obviously to be over cases in which Congress has given the original jurisdiction to inferior courts established under Section 1, Article III. The question of concern here is whether Congress can also give these inferior courts original jurisdiction over cases in which Article III has given the Supreme Court original jurisdiction. The well-established answer is that Congress can give inferior courts such concurrent jurisdiction, even in cases involving States.

In 1884, the Supreme Court twice addressed itself to the problem of whether Article III's grant of orig-

inal jurisdiction to the Supreme Court was a grant of exclusive jurisdiction. In *Börs* v. *Preston*, 111 U.S. 252 (1884), a consul was a party, and in *Ames* v. *Kansas*, 111 U.S. 449 (1884), a State was a party. In both cases, the Court carefully considered the earlier cases bearing on the point, 111 U.S. at 256-261, 462-471, and laid great stress on the fact that the first Congress, in the Judiciary Act of September 24, 1789, 1 Stat. 73, 80-81, stated that the Supreme Court had exclusive jurisdiction in some cases involving ambassadors and States, and original but not exclusive jurisdiction of other suits involving ambassadors and States. 111 U.S. at 256-257, 463-465. The construction placed on the Constitution by the members of this first Congress was entitled to great weight because many of them had been members of the Constitutional Convention and "were, therefore, conversant with the purposes of its framers." 111 U.S. at 256. Mr. Chief Justice Waite summed up the conclusions of the Court in *Ames* v. *Kansas*, 111 U.S. at 469, in the following language:

> In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative de-

> partment of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist.

The district court chose to brush this passage aside as dictum (R. 30),[4] but that the Supreme Court itself has not so regarded it is plain from the Court's own reliance on it in *United States* v. *Louisiana*, 123 U.S. 32, 36 (1887); *United States* v. *California*, 297 U.S. 175, 187 (1936); *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 464 (1945); and *Case* v. *Bowles*, 327 U.S. 92, 97 (1946). In *United States* v. *California* and *Case* v. *Bowles*, the Court held that Congress can confer on the district courts of the United States concurrent jurisdiction not only over a suit *between* the United States and a State, but also over a suit *by* the United States *against* a State. The question thus becomes one of whether Congress has done so.

The United States in the present case relies on the jurisdiction given district courts by 28 U.S.C. sec. 1345, entitled "United States as plaintiff," which reads as follows:

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[4] It is not in the least bit clear to us why the presence of a federal question in *Ames* v. *Kansas* makes the Chief Justice's nine-page discussion of exclusive and concurrent jurisdiction dictum, especially when part of that discussion is devoted to a definition of "dicta." 111 U.S. at 467. In any event, "dictum" or not, we submit that Chief Justice Waite was right, as the 80 years of history since then have shown.

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

The section by its terms embraces the case at bar unless it comes within an exception "otherwise provided by Act of Congress." Prior to the 1948 revision of the Judicial Code, 28 U.S.C. sec. 341 (1946 ed.) did otherwise provide in that it gave the Supreme Court "exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." The Act of June 25, 1948, 62 Stat. 869, 927, which completely recodified the Judicial Code, revised the original jurisdiction of the Supreme Court by placing the following provision in 28 U.S.C. sec. 1251(b):

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> * * * *
>
> (2) All controversies between the United States and a State;
>
> * * * *

Thus, since it is no longer "otherwise provided" by Congress that the Supreme Court have exclusive jurisdiction over controversies between the United States

and a State, Section 1345 grants jurisdiction over such a suit.[5]

Since the revision of Section 1251, both this Court and the Tenth Circuit have in effect held that 1251 (b) (2) makes possible a suit against a State under 1345. In *United States* v. *State of Washington*, 233 F.2d 811 (C.A. 9, 1956), Washington denied that the district court had had jurisdiction over the suit under Section 1345 on the ground that it could not be sued in any forum other than the Supreme Court without its consent. Judge Mathes, sitting on this Court for that case, answered that argument as follows (233 F.2d at 813-814):

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[5] Hart and Wechsler, in *The Federal Courts and the Federal System* (1953), p. 228, state:

> The Revisers' Notes to § 1251 indicate that they were changing the law without knowing what they were doing. Contrary to the revisers' statement, the Supreme Court's jurisdiction of actions by the United States against a state was exclusive under 28 U.S.C. § 341 (1940) * * *.

A comparison of Section 341 of the old code with Section 1251 of the present code will show that there definitely was a change, but there is nothing to indicate the revisers made it without knowing what they were doing. Contrary to Hart and Wechsler's intimation, the revisers did not state that the Supreme Court's jurisdiction of actions by the United States against a State was not exclusive under old Section 341. In fact, the revisers say nothing about the matter or about the precise origin of Section 1251(b) (2). In view of the fact that a special Supreme Court committee, consisting of Chief Justice Stone and Associate Justices Frankfurter and Douglas, assisted the revisers "in the solution of problems of concern to that Court," H.Rept. 308, 80th Cong., 1st Sess., Cong. Doc. Ser. No. 11125, it is hardly likely that the revisers did not know what they were doing.

Since Ames v. Kansas, 1884, 111 U.S. 449, 4 S. Ct. 437, 28 L.Ed. 482, it has been held to be "within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction." 111 U.S. at page 469, 4 S. Ct. at page 447; see: Case v. Bowles, 1946, 327 U.S. 92, 66 S.Ct. 438, 90 L. Ed. 552; State of New York v. United States, 1946, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326; United States v. State of Montana, 9 Cir., 134 F.2d 194, 196, certiorari denied, 1943, 319 U.S. 772, 63 S.Ct. 1438, 87 L.Ed. 1720; Hart and Wechsler, The Federal Courts and The Federal System 228 (1953).

Section 1251(b) (2) of revised Title 28 of the United States Code provides that: "The Supreme Court shall have original but not exclusive jurisdiction of: * * * All controversies between the United States and a State * * *."

And 28 U.S.C. § 1345 declares that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *."

The suit at bar to quiet title in the Government in trust for certain Indian wards is clearly an action "commenced by the United States" within the meaning of § 1345. Cf. United States v. Minnesota, 1926, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539. Accordingly the District Court correctly assumed jurisdiction over the person of the State of Washington. United States v. California, 1936, 297 U.S. 175, 187-189, 56 S.Ct. 421, 80 L.Ed. 567.

Judge Mathes, sitting as the district court in this case, now distinguishes his own holding on the ground that the *State of Washington* case involved the protection of federal real property (R. 33). It is evident from the above passage that this was not the basis of his holding, even if it could be said that the present case did not involve the protection of federal interests in real property.

In *State of Colorado* v. *United States*, 219 F.2d 474, 476-477 (C.A. 10, 1954), the court set forth the following argument and answer:

> Colorado contends further that as a sovereign state it is not subject to the jurisdiction of the Federal District Court. 28 U.S.C.A. § 1251 gives the Supreme Court original but not exclusive jurisdiction of "All controversies between the United States and a State;" and 28 U.S.C.A. § 1345 gives the United States Courts jurisdiction "of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress," and 28 U.S.C.A. § 1355 gives Federal District Courts original jurisdiction exclusive of the courts of the states of actions to enforce fines or penalties incurred under any act of Congress. This was such an action and was instituted under Sections 1345 and 1355, supra.

In addition to these opinions by courts of appeals, there is a holding by a three-judge district court that it had jurisdiction under Section 1345 over a suit by the United States against Louisiana. *Bush* v. *Orleans Parish School Board*, 188 F.Supp. 916, 921 (E.D. La.

1960), affirmed as to other matters, 365 U.S. 569 (1961). And in *United States* v. *State of Wyoming*, 195 F.Supp. 692, 693 (D. Wyo. 1961), aff'd, 310 F.2d 566 (C.A. 10, 1962), certiorari pending, and *United States* v. *State of Minnesota*, 113 F.Supp. 488, 490 (D. Minn. 1953), the district courts stated that they had jurisdiction under 1345 and went on to the merits without further discussion. Cases in which the courts simply took jurisdiction without bothering to state the basis are *Utah State Bd. for Vocational Ed.* v. *United States*, 287 F.2d 713 (C.A. 10, 1961); *State of Utah* v. *United States*, 304 F.2d 23 (C.A. 10, 1962), cert. den., 371 U.S. 826; and *United States* v. *State of California*, 143 F.Supp. 957 (N.D. Cal. 1956).

Despite the unambiguous wording of Sections 1251 and 1345, the district court apparently thinks that Section 1345 must specifically say that it allows suits by the United States against States before such suits can be brought in the district court. The use of the phrases "*all* controversies" in Section 1251 and "*all* civil actions, suits or proceedings" in Section 1345 was not enough to convince the district court that Congress really meant "all," as is apparent from this paragraph of the district court's holding (R. 36-37):

> There is no mention in the language of § 1345 of a State as a party defendant, while § 1251 (b) merely describes in general terms the non-exclusive nature of the Supreme Court's jurisdiction. So there is nothing in the language of these provisions to compel the inclusion of a State as involuntary defendant within the original jurisdiction of the Federal district courts, in an

> action brought by the United States upon a claim for damages caused by alleged tortious conduct of agents of the State.

Earlier in the opinion (R. 28), Judge Mathes pointed to a line of cases "wherein the Congress has, by grant within the ambit of Constitutional power, *specifically conferred* concurrent jurisdiction upon the Federal district courts" [emphasis added]. In connection with the insistence that Section 1345 specify that States can be sued under its authority, it is highly instructive to look at the statutes involved in this group of cases to see just how Congress "specifically conferred concurrent jurisdiction upon the Federal district courts." Once again, a simple listing of the cases and the statutes involved will suffice to make the point:

> *Case* v. *Bowles*, 327 U.S. 92 (1946), was a suit by the Price Administrator against the Commissioner of Public Lands of the State of Washington, but was in effect a controversy between the United States and the State of Washington, 327 U.S. at 97. Jurisdiction was sustained under Section 205(c) of the Price Control Act, Jan. 30, 1942, 56 Stat. 23, 33, as amended, 50 U.S.C. (1940 ed.) Supp. V, app. sec. 925(c), which provided in part: "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act." The Section does not refer to the possibility that States may be defendants.
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> *United States* v. *California*, 297 U.S. 175 (1936), was brought under the federal Safety Appliance

Act of March 2, 1893, 27 Stat. 531, 532, as amended, 45 U.S.C. (1934 ed.) sec. 6, which then provided in part: "Any common carrier [violating this Act] shall be liable to a penalty * * * to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *." Once again, suits against States are not mentioned.

State of Alabama v. *United States*, 304 F.2d 583 (C.A. 5, 1962), was brought under the Civil Rights Act of 1957, Sept. 9, 1957, 71 Stat. 637, 42 U.S.C. sec. 1971(c),, but had been dismissed because that Act did not authorize the suit against the State. 267 F.2d 808. While the case was pending in the Supreme Court, Congress passed the Civil Rights Act of 1960, May 6, 1960, 74 Stat. 86, 92, 42 U.S.C. (1958 ed.) Supp. III, sec. 1971(c), expressly authorizing such actions against States. The Supreme Court then remanded the case to the district court. 362 U.S. 602 (1960).

United States v. *State of Montana*, 134 F.2d 194 (C.A. 9, 1943), cert. den., 319 U.S. 772, was said to be brought under Section 203(a) of the National Industrial Recovery Act, June 16, 1933, 48 Stat. 202, 40 U.S.C. (1940 ed.) sec. 403. But that section only authorized the acquisition of "any" real property. Jurisdiction of the district court over the condemnation must have rested on the general condemnation provision, 40 U.S.C. (1940 ed.) sec. 257, which again makes no specific mention of States as defendants.

State of Minnesota v. *United States*, 125 F.2d 636 (C.A. 8, 1942), was brought under the gen-

eral condemnation provision, 40 U.S.C. (1940 ed.) sec. 257.

State of California v. *United States*, 91 F.Supp. 722 (N.D. Cal. 1950), was brought by the State against the United States under the Federal Tort Claims Act, 28 U.S.C. secs. 1346 (b, c), 2671-2680. The court held that under 28 U.S.C. sec. 1346(c), which gives the district court "jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff," the United States could file a cross-complaint, here also there being no specific mention of States.

When we note that in five of the six cases cited jurisdiction was based on statutes which made no reference whatsoever to States as defendants, we see that there is no justification for the district court's notion that jurisdiction over States cannot exist unless a statute provides it *in haec verba*. The cases summarized above themselves demonstrate that this is not so.

This Court recently considered a problem analogous to that of the "specifically conferred concurrent jurisdiction" statutes in *United States* v. *Washington Toll Bridge Authority*, 307 F.2d 330, 336 (1962), certiorari ~~pending~~ den. 7-18-63. There this Court rejected the argument that the word "person," as used in 26 U.S.C. sec. 4291, could not be construed to include States, pointing out that States had been considered persons under comparable statutes and citing *Sims* v. *United States*, 359 U.S. 108 (1959). In *Sims*, the Supreme Court met the same argument about 26 U.S.C. sec. 6332: "Though the definition of 'person' in § 6332 does not mention States or any sovereign or political

entity or their officers among those it 'includes' (Note 3), it is equally clear that it does not *exclude* them." 359 U.S. at 112, emphasis by the Court. This can hardly be said to be giving "a restrictive meaning" to a statute in the presence of "serious Constitutional doubts," the district court's reason for refusing to admit that Sections 1251(b) and 1345 say what they say (R. 36, 37).

The unambiguous wording of Sections 1251 and 1345, the construction placed upon these provisions by this Court and others, and the frequent assumption of jurisdiction under them all make clear that the lower court erred in dismissing the Government's suit.[6] The judicial power of the United States does embrace the suit and Congress has given the district court jurisdiction over it.

III

State Immunity To Suit By Individuals In Its Own Courts Has No Bearing On Federal Jurisdiction and Is No Bar To Suits By the United States

The Constitution establishes the judicial power of the United States, and the Constitution and the Judicial Code, Title 28, U.S.C., give the various federal courts jurisdiction to exercise that judicial power. If federal jurisdiction exists in a given case, it cannot be modified by state law, either statutory or case law. In *Harrison* v. *St. L. & San Francisco R.R.*, 232 U.S.

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[6] So far as we know, this case stands alone in denying jurisdiction.

318, 328 (1914), the Court, upholding the right of removal from a state to a federal court, said:

> It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests and the lines which define it are so broad and so obvious that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. * * *

In *Cowles* v. *Mercer County*, 7 Wall. 118, 122 (1868), Chief Justice Chase had said that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." To the same effect are *Hyde* v. *Stone*, 20 How. 170, 175 (1857); *Insurance Company* v. *Morse*, 20 Wall 445, 453 (1874); *Lincoln County* v. *Luning*, 133 U.S. 529, 531 (1890); *Chicot County* v. *Sherwood*, 148 U.S. 529, 534 (1893); *Smyth* v. *Ames*, 169 U.S. 466, 516-517 (1898); and *Barrow Steamship Company* v. *Kane*, 170 U.S. 100, 111 (1898). Thus it is plain that whatever rule California follows as to its own immunity to suit is irrele-

vant where, as here, jurisdiction rests on the Constitution and the Judicial Code.[7]

It follows logically from the foregoing that any California immunity to private suit in its own courts is not effective in the federal courts because their jurisdiction is independent of state law. That is, any state immunity to private suits in the federal courts must stem from federal, not from state law. *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), took an extreme view on lack of necessity for state consent to suit in the federal courts, holding that Article III extended the judicial power of the United States to unconsented suits against a State by citizens of another State. This prompted the adoption of the Eleventh Amendment, which reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of an-

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[7] The district court's opinion states that California asserted sovereign immunity at the hearing (R. 23), but the minutes do not indicate that the State said anything (R. 15). The State has yet to file a pleading or brief in this case. The status of the doctrine of sovereign immunity in California at the time of the district court's dismissal of this case was hardly as clear as the district court indicated. In *Muskopf* v. *Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), the Supreme Court abolished the doctrine. On September 15, 1961, the California legislature reinstated the doctrine until 90 days after the 1963 Regular Session of the Legislature, Cal.Stats. 1961, C. 1404, p. 3209, Cal. Civil Code, sec. 22.3. That this statute merely suspends actions against the State is the gist of *Corning Hospital Dist.* v. *Superior Court of Tehama Co.*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

other State, or by Citizens or Subjects of any Foreign State." But in stating the extent of a State's immunity to private suits in federal courts, the Eleventh Amendment gives no sanction to the notion that a State has sovereign immunity against suits by the United States, a notion long since dispelled by the Supreme Court.

In *United States* v. *Texas*, 143 U.S. 621 (1892), Texas argued that it could be sued by the United States only in its own courts with its consent. Repeating the rule that "it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent" (143 U.S. at 645-646, emphasis by Court), the Court pointed out that a suit between sovereigns was a different matter (143 U.S. at 646):

> The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch* v. *State of Maryland,* 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the

> Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states.

In *Monaco* v. *Mississippi*, 292 U.S. 313 (1934), the Supreme Court considered carefully and at length the problem of when a State's consent is necessary for suits to be entertained against her under Article III as construed in the light of the Eleventh Amendment. While the Court would not hold that the inclusion of certain cases in Article III automatically dispensed with the necessity of state consent,[8] it said that there

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[8] The opinion views *Chisholm* v. *Georgia, supra,* as departing from the understanding of the Constitution's fathers

were others in which consent could be implied as inherent in the constitutional scheme. In this category went suits against States by other States and by the United States, about which the Court said the following (292 U.S. at 328-329):

> 1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution, § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting "in their highest sovereign capacity, in the convention of the people," waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established "by their own consent and delegated authority" as a necessary feature of the formation of a more perfect Union. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 720; *Louisiana* v. *Texas*, 176 U.S. 1, 16, 17; *Missouri* v. *Illinois*, 180 U.S. 208, 240; *Kansas* v. *Colorado*, 185 U.S. 125, 142, 144; 206 U.S. 46, 83, 85; *Virginia* v. *West Virginia*, 246 U.S. 565.
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> 2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. *United States* v. *North Carolina*, 136 U.S. 211; *United States*

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that suit against a State would be only by its consent, and the Eleventh Amendment as restoring this understanding. 292 U.S. at 324-325, 329.

> v. *Texas*, 143 U.S. 621, 644, 645; 162 U.S. 1, 90; *United States* v. *Michigan*, 190 U.S. 379, 396; *Oklahoma* v. *Texas*, 258 U.S. 574, 581; *United States* v. *Minnesota*, 270 U.S. 181, 195. Without such a provision, as this Court said in *United States* v. *Texas*, *supra*, "the permanence of the Union might be endangered."

United States v. *California*, 297 U.S. 175 (1936), further demonstrates the irrelevance of the State's sovereign immunity, especially of the distinction between sovereign or governmental functions and proprietary functions (see R. 16-17, pars. 2, 3; R. 23-24). In that case, California claimed that it was not subject to the Federal Safety Appliance Act because it operated the railroad in question in its sovereign capacity. The Court dismissed the contention in the following passage (297 U.S. 183-184):

> Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. * * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.* * * * [Emphasis added.]

Similarly, that building a road may be a governmental function under California law does not immunize the State to suit by the United States for the destruction of public property. Such immunity would infringe the plenary power of Congress, granted it in Clause 2, Section 3, Article IV of the Constitution, "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." As to the authority of the Attorney General to bring the suit to vindicate the federal interest, see *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 278-285 (1888); *United States* v. *California*, 332 U.S. 19, 26-29 (1947).

To avoid belaboring the point further, we will simply refer the court to the many cases cited in Points I and II in which the United States successfully sued States. State immunity to private suit is no more a barrier to suit by the United States in the present case than it was in any of those.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the district court should be reversed and the case remanded for appropriate pleading by the State and trial on the merits.

Respectfully,

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CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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